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In The

SUPREME COURT of the UNITED STATES

October Term, 1968

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UNITED STATES OF AMERICA,

Respondent,

vs.

ANTON LYSCZYK,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Petitioner, ANTON LYSCZYK, through his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in *United States of America vs. Anton Lysczyk.*

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at ....., F. 2d ..... (June 27, 1968), a copy of which is contained herein as Appendix A.

JURISDICTION

The Court of Appeals for the Seventh Circuit affirmed the judgment of conviction of the petitioner Lysczyk on June 27, 1968.

No petition for rehearing has been filed.

The petitioner believes that 28 U. S. C. 1254(1) confers on this Court jurisdiction to review the judgment of the Court of Appeals of the Seventh Circuit.

QUESTIONS PRESENTED

1. Were the mandates of the Fourth Amendment prohibiting unreasonable search and seizure, and Rule 41(c) of the Federal Rules of Criminal Procedure, violated when the Commissioner issued a search warrant wherein, with a single exception, the supporting affidavit was based solely on information and belief and did not indicate any sources for the affiant's belief or set forth any other basis upon which a finding of probable cause could be made?

2. Was the petitioner denied a fair and impartial trial and due process of law where he was unable to present testimony in his defense because, unlike the prosecution, he could not promise his witnesses immunity?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Criminal Procedure, Rule 41(c):

> Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the

persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

Federal Rules of Criminal Procedure, Rule 52(b):

> Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

On November 17, 1965, a search warrant was issued by the United States Commissioner for the Western District of Wisconsin directing that Kay's Rooms & Hotel Bar, located at 7-9 Silver Street, Hurley, Wisconsin, be searched for a ledger book and that it be seized. (R. 59) The issuance of the search warrant was based upon the following affidavit.

Affidavit for Search Warrant

"Malvin Lee Wessel, being first duly sworn, upon his oath deposes and says:

That he is a Special Agent of the Federal Bureau of Investigation, and that in that capacity he has personally investigated complaints of the violation of the laws of the United States of America at Hurley, in the Western District of Wisconsin, and that of his own personal knowledge MARCIA LYON is the operator

of Kay's Rooms and Hotel Bar, located at 7-9 Silver Street, Hurley, Wisconsin; and that as such operator and on information and belief she has maintained a ledger book containing numbers which have been assigned to acceptable patrons of her illegal operation of a house of prostitution within said premises; and that said ledger book contains the name of the city of address of such patron, followed by a numerical number which indicates the price paid for the services of a prostitute.

That this affidavit is made for the purpose of securing a search warrant to seize the above-mentioned ledger book.

That the grounds for the search and seizure are to preserve as evidence the above-mentioned records, which are evidence of the operation of an illegal house of prostitution, which constitutes the basis of a conspiracy to violate Section 1952 of Title 18 of the United States Code.

Affiant further states that on information and belief your affiant says that the said Marcia Lyon has engaged in a conspiracy to violate Section 1952 of Title 18 of the United States Code by soliciting females from out of the state of Wisconsin, to wit, from St. Louis, Missouri, and Terre Haute, Indiana, to come to Wisconsin to engage in prostitution at her said place of business, and as a result of such solicitation females from both St. Louis, Missouri, and Terre Haute, Indiana, did travel into the Western District of Wisconsin for the purpose of and did engage in prostitution at said place of business, in violation of Section 1952 of Title 18 of the United States Code.

Affiant further states on information and belief that a significant portion of the numbers so assigned in said

ledger book refer to patrons who reside outside of the State of Wisconsin.

/s/ Malvin Lee Wessel
Special Agent, F. B. I.

Subscribed and sworn to before me
at Madison, Wisconsin, Nov. 17, 1965.

/s/ John R. Adams
United States Commissioner
Western District of Wisconsin" (R. 869)

A search of the described premises was made on the 22nd day of November, 1965, and the ledger book was seized by the F. B. I. agents. (R. 59)

On December 2, 1965, the petitioner and Marcia Lyon were charged in a six count Indictment. (R. 735) Subsequently, four of the six counts were dismissed either before or during the trial against each of them. A joint trial of both defendants was had before a jury. Judgment of conviction was entered in the Federal District Court for the Western District of Wisconsin on the 19th day of June, 1967, based upon the jury verdict finding them guilty on Counts I and III of the Indictment. Count I charged petitioner and Marcia Lyon with conspiracy to travel in, and to use the facilities of, interstate commerce with intent to carry on a prostitution enterprise unlawful in the State of Wisconsin, in violation of 18 U. S. C., Section 371. Count III charged them with travel in, and/or inducing others to travel in, interstate commerce to carry on a prostitution enterprise unlawful in the State of Wisconsin, in violation of 18 U. S. C., Sections 2 and 1952. Petitioner and defendant Lyon were each fined One Thousand Dollars ($1,000.00)

and sentenced to three (3) years imprisonment on each count, the sentences to run concurrently. (R. 849, 850)

During the trial, the ledger (seized subject to the search warrant) was marked for identification and testimony was taken after objection by defense counsel. (R. 55-77). Objection at that time was made to the introduction of the ledger on the grounds that the search warrant was not served on the proper defendant, Lyon, and that when the seizure was made Lyon was not advised of her right to an attorney. (R. 56) These objections were overruled by the Court and the witnesses Payne (R. 83), Maynard (R. 97), Dixon (R. 158), and Wessel (R. 228) then testified in the presence of the jury regarding this exhibit. The defendant Lyon also testified regarding this exhibit. (R. 387-404) This ledger was subsequently sent to the jury room for their examination. (R. 720)

The petitioner had subpoenaed two witnesses, Small and Stone, to testify on his behalf. (R. 484-506) Both of these witnesses had counsel present. (R. 158) Both witnesses refused to testify on the grounds that their answers might tend to incriminate them. Defense counsel requested that the witnesses be granted immunity to compel their testimony. (R. 487) The prosecutor refused to move to grant them immunity and objected to it and the Court ruled that it had no authority to grant such immunity. (R. 488)

Prior to this time, during the course of the Government's case, witnesses were called who testified that they had been promised immunity by the Government for their testimony (R. 309-312), or had immunity discussed with them (R. 99), or testified that charges would be dismissed in return for their testimony. (R. 86)

In addition, the Government produced the witness DeLay who testified on direct examination to many incriminating matters. (R. 240-245) She had been advised that she was granted immunity by an F. B. I. agent. (R. 309-312) However, the United States Attorney, after her direct testimony, stated she had not been granted immunity. (R. 288) On cross-examination by defense counsel she refused to testify on the grounds her answers would tend to incriminate her as to the following questions: Her current address (R. 330); nature of her present work (R. 334); the type of her work and current earnings (R. 335); her present employer (R. 330); in whose company she left Hurley for St. Louis (R. 338); whether she turned money over to the defendant Lyon (R. 341); and, who took her away from the defendant's residence (R. 341). Defendant's attorney objected that he was denied the right of cross-examination and requested a mistrial. (R. 349) The trial court ruled that the witness testified against the defendants and that the defendants were deprived of a full opportunity to cross-examine her, and therefore, it denied the motion for a mistrial but granted a motion to strike all of her testimony. (R. 356)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The affidavit in support of the search warrant which directed the seizure of the ledger was based almost entirely upon information and belief. The only fact recited on knowledge was that Marcia Lyon was the operator of Kay's Rooms & Hotel Bar located at 7-9 Silver Street, Hurley, Wisconsin. Thereafter, all of the allegations regard-

ing the maintenance of this ledger book and the information contained therein and the recitation of information that a conspiracy had been entered into by solicitation of females out of the State of Wisconsin to engage in prostitution in Wisconsin were all based on information and belief and there was absolutely no recitation indicating the sources of the affiant's belief.

Rule 41(c) requires that probable cause be shown before the issuance of the warrant. This was not done because the Commissioner was not apprised of the source of the affiant's information.

The petitioner submits that the instant affidavit contains the same defects as those referred to in *Giordenello vs. United States*, 357 U. S. 480, 486:

> "The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made."

The fact that an affidavit is based on information and belief is not fatally defective in and of itself. However, there must be presented a substantial basis for crediting the hearsay. *Jones vs. United States*, 362 U. S. 257, 269.

The instant affidavit provided the Commissioner with absolutely no information as to the affiant's source and therefore the Commissioner was precluded from making an independent determination as to whether the warrant should or should not issue, and it thus had the same effect as was cited in *Aguilar vs. Texas*, 378 U. S. 108, 111 of reducing the Fourth Amendment to a "nullity and leave

the peoples' home secure only in the discretion of police officers."

Exactly as in *Aguilar vs. Texas, supra,* pages 113, 114, wherein the Court said:

> "The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself on the persuasiveness of the facts relied on . . . to show probable cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.' "

It is petitioner's contention that the warrant in the instant case should not have been issued because the affidavit did not provide a sufficient basis for the finding of probable cause, and that the evidence obtained as a result of the search was therefore inadmissible.

The issuance of the warrant was plain error. It was both obvious and substantial. A reading of the supporting affidavit clearly shows that this supporting document does not meet the requirements of *Aguilar, supra,* and *Giordenello, supra.* The ledger seized pursuant to the warrant was the key piece of physical evidence used by the Government. It was testified to in detail by various witnesses including the defendant Lyon. It was sent to the jury for their deliberation.

Even though there was no pretrial motion to exclude this evidence, this objection may be noticed as plain error

on appeal—Rule 52(b), Federal Rules of Criminal Procedure *Sykes vs. United States,* (5th Circuit) 373 F. 2d 607, 612 (1966), even though *United States vs. Burrell,* (7th Circuit) 324 F. 2d 115, 119 (1963) held to the contrary, thus creating a conflict between these circuits.

Petitioner believes that this was error of such a nature as to affect the substantial rights of the petitioner and may be noted by this Court even though the defects of the search warrant were not brought to the attention of the trial court. This is such a fundamental right that notice should be taken of this grave defect.

2. The petitioner was denied a fair and impartial trial and due process of law because he was unable to present testimony in his defense because, unlike the prosecution, he could not promise his witnesses immunity.

During the prosecution's case, witnesses were called to testify that they had been promised immunity, or charges would not be brought against them, or charges would be dismissed against them in return for their testimony. One witness testified on direct examination in the belief that she had immunity, and then refused to testify on cross-examination and refused to divulge her current address and occupation on the grounds that such answers would tend to incriminate her. Irreparable harm was done to the petitioner even though her testimony was stricken.

The petitioner subpoenaed two witnesses to testify in his behalf. These witnesses had also been subpoenaed by the United States Attorney but not called by him. When these witnesses were called to the stand by the defense counsel, they refused to testify on the grounds their answers would tend to incriminate them. Defense counsel

requested that the U. S. Attorney grant them immunity so they could testify, but this request was not granted. The witnesses thereafter refused to testify. It is the petitioner's contention that because he was unable to present testimony favorable to him that he was denied a fair trial.

As was stated in *Washington vs. Texas*, 388 U. S. 14:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has a right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

We submit that to be able to compel a witness to appear in Court on behalf of the defendant is meaningless if the witness cannot also be compelled to testify. The only manner in which the petitioner's witnesses could be forced to testify would be by a grant of immunity. When the prosecutor refuses to grant this immunity, then the fact that the witnesses have been produced on behalf of the defendant but refuse to testify, places the defendant in a worse light in the eyes of the jury than if he had not produced the witnesses in the first place.

We therefore have the paradoxical situation in which the prosecution can promise immunity or dismissal of charges against a witness to induce them to testify and then produce that testimony, and while the defendants are guaranteed the right to compel attendance of witnesses (Sixth Amendment, United States Constitution; *Washing-*

ton vs. Texas, 388 U. S. 14), they are precluded from granting witnesses immunity to elicit testimony favorable to the defendant. Unless a witness can be compelled to testify under a grant of immunity, the mere fact that the witnesses can be compelled to appear in Court satisfies form while it violates substance. Therefore, it is submitted that this petitioner was denied a fair trial because he was not allowed to present a defense as is guaranteed by the Sixth Amendment.

CONCLUSION

The petitioner's basic rights under the Fourth Amendment were violated by the search and seizure conducted pursuant to the search warrant. The supporting affidavit was such a plain and obvious error, and was so substantial in nature that it can be, and should be, noticed and a new trial granted excluding this evidence.

In addition, the petitioner was unable to produce evidence on his behalf because his witnesses could not be granted immunity from prosecution and he was therefore precluded from presenting a defense.

The petitioner now requests the Supreme Court of the United States to allow a writ of certiorari to issue to determine these issues.

Respectfully submitted,

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